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Supreme Court of the United States

October Term, 1979
No. 79-1288

ETHAN WILT and HEATHER WILT, TEREASA RACINSKAS and ADAM RACINSKAS, CHRISTOPHER BOEMAN and THOMAS BOEMAN, KATHLEEN TOKE, SHAWN MACK and ANDREA MACK, REGINA HARRIS, DEJONA CEASOR, CORA OWENS, TIMOTHY J. COSGROVE, DANIEL WILT and PEGGY WILT, BOARD OF EDUCATION, BRATENAHL LOCAL SCHOOL DISTRICT,
Petitioners,

vs.

STATE BOARD OF EDUCATION, DEPARTMENT OF EDUCATION OF OHIO, FRANKLIN B. WALTER, BOARD OF EDUCATION, CLEVELAND CITY SCHOOL DISTRICT, VINCENT C. CAMPANELLA,
Respondents.

BRATENAHL REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

1. The Spurious Issue Of Res Judicata 2
2. One Final Judgment Ought To Be Enough 4
3. The Case Merits This Court's Attention 4
4. The Case Presents No Problem Of Mootness 5

Conclusion 6

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The short answer to the opposition filed by respondents is that given by the State Court of Appeals to like maneuvering by the State Board. As the court put it:

> "When one travels upon the wrong road, he usually arrives at the wrong destination." (A47.)

Consider first—

1. The Spurious Issue Of Res Judicata

The State Board, the State Superintendent, and the Cleveland Board are in lockstep marching down that wrong road. They call it res judicata.

Respondents, understandably, never come to grips with, or even mention, one stubborn fact*: they do not explain how an adjudication (by the Supreme Court of Ohio) that the court *"lacked subject matter jurisdiction"* (A82) can, on any reasoned basis, be transformed into an adjudication that Bratenahl was dissolved ten years ago.

Where there is no jurisdiction, there can be no res judicata. This is true no matter how many times the error is repeated, and no matter how many courts of whatever degree so say.

Federal law controls that which is res judicata within the federal courts. The federal courts below dismissed this action on the ground that *Bratenahl I* and *Bratenahl II* were a proper basis for the application of res judicata. The error is plain, since those cases held only that the courts of the State of Ohio lacked subject matter jurisdiction. Now, another wrench is in the works—*Wiss v. Cuyahoga County Board of Elections,* 61 Ohio St. 2d 298 (1980).

Wiss is, of course, the law of Ohio. However, it cannot control federal law upon res judicata. The case retroactively interprets *Bratenahl I* as holding that the courts of Ohio were without subject matter jurisdiction because the merits had been adversely resolved against Bratenahl. The logic is facially absurd.

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*"There is nothing like a fact. Clean or grubby, Slim or Chubby, There is nothing like a fact." Judge Simon H. Rifkind, in Counsel on Appeal, p. 170.

A court with the power to hear a controversy can determine the merits. The converse is not true. *Wiss* states that Bratenahl could not invoke subject matter jurisdiction because somehow the state judicial system (which lacked jurisdiction) had determined the merits adversely to Bratenahl. If this be so, how did the state court assume the power to determine the merits?

Within the constraints of the Constitution, the Ohio Supreme Court can establish the state's law of res judicata. The involuted logic of *Bratenahl I* and *II* and *Wiss*—that the Court's adverse ruling upon the merits is the *"sine qua non* underpinning" of its determination of no subject matter jurisdiction—should not infect the federal law on res judicata.

The law has always been clear, previously, that a determination of the power to hear a controversy precedes a hearing of the controversy, and that a determination of a lack of subject matter jurisdiction cannot be the basis of res judicata. In the federal courts, only a decision upon the merits by a court with jurisdiction over the subject matter can be the basis of res judicata.

The respondents' argument fails to reveal the legal sleight of hand by which they urge that the individual petitioners "had an opportunity to present" (Opposition of State Board, 8) their claims in the state litigation to which only the Bratenahl Local School District was party. Bratenahl, as a political subdivision of the State of Ohio, has limited rights under the U.S. Constitution. *Hunter v. Pittsburgh,* 207 U.S. 161 (1907). Since the individual petitioners could not have asserted their present substantive and procedural due process claims under the Fourteenth Amendment through Bratenahl, they must be able to do so in this action without the bar of res judicata.

The claim of res judicata is a spurious one.

However, Bratenahl does agree that—

2. One Final Judgment Ought to Be Enough

There is such a judgment. It was entered August 30, 1973, in the declaratory judgment action (A38), upon Opinion issued January 9, 1973. (A28-35.) It is a final judgment, never modified, never reversed. It is true res judicata. It adjudged:

> "Bratenahl in fact does exist and is operating as a school district and at present maintains schools with grades 1 through 12." (A33.)

That is a judgment not mentioned by respondents; it is a judgment the Federal Court was obligated to respect, and that it did not do so, underscores the denial of rights that has resulted.

3. The Case Merits This Court's Attention

If review is denied, "the persistence of the State Board in its efforts to avoid determination upon the merits" (A35) will have achieved the destruction of a first-rate school system, where integration works. The State Board will have brought that result about without any inquiry into the merits of Bratenahl's case.

The merits of Bratenahl's right to live have been inspected by the courts in five cases. In every one of the five, a *decision on the merits has upheld Bratenahl.* Four of those decisions have been wiped out by the Ohio Supreme Court's adjudication that the Court:

> "lacked subject matter jurisdiction * * *." (A82.)

On adjudication, the judgment in the declaratory judgment case *was not wiped out.* It never went to the Supreme Court. It stands of record, unmodified, and final.

The four decisions on the merits that the Ohio Supreme Court wiped out on the ground the court lacked jurisdiction are:

1. The judgment of January 9, 1973, in the first administrative appeal. (A28-35.)
2. The judgment of December 16, 1976, in the second administrative appeal. (A40-68.)
3. The judgment in two separate mandamus actions entered December 22, 1976 (A90) upon Opinion issued December 16, 1976. (A87-90.)

No case has resulted in a judgment on the merits in favor of the State Board. Until and unless that happens, Bratenahl is entitled not to have the school system it has supported since 1890 destroyed by an adjudication of which the Court "lacked subject matter jurisdiction." (A82.)

4. The Case Presents No Problem of Mootness

In hope, at any cost, to escape the painful prospect of being forced, at long last, into a courtroom to answer *on the merits,* the State Board mistakenly contends the case is moot; it says "dissolution and merger have already taken place." The fact is that *to this very moment the Bratenahl School System remains functionally intact and independent of the Cleveland system into which the State Board would force Bratenahl.* Even during the long months the Cleveland schools were shut tight by the teachers' strike only lately ended, the Bratenahl schools continued full operation. The only education going on in public schools was in Bratenahl.

There is no problem of mootness. The case will become such only if the State Board succeeds in finally preventing inquiry by any court into the merits.

CONCLUSION

A school system that has flourished since 1890, that has solved the problems of integration, and for the continued existence of which the community has voted a bond issue, constructed a model new high school building, and successfully operated it for ten years, ought not to be condemned to die by default—without inspection by any court of the merits of its claim to live (except by one whose final judgment upholding the school is ignored).

The writ should issue and the case be summarily remanded for trial on the merits of the civil rights claims asserted by these petitioners.

Respectfully submitted,

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